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RECENT DEVELOPMENT AND TENDENCY OF THE LAW OF PRIZE.

The status of modern prize law is expressed in outline in the for propositions of the Declaration of Paris of 1856, by which privateering was abolished; enemy goods under a neutral flag, and neutral goods under an enemy flag, were protected, with the exception of contraband of war; and blockades were required to be effective in order to be binding. The United States had previously proposed to the maritime nations, as permanent principles of international law, the declaration respecting enemy and neutral goods; and coupled its declination to accede to the Declaration of Paris in its entirety, with an offer to assent to the first proposition abolishing privateering if amended by a declaration that the private property of individuals, though belonging to belligerent states, should be altogether exempt from capture in maritime war. This enlightened doctrine marks the furthest advance in the field, and, as our diplomatic history shows, has been the consistent attitude and proposal of the United States.

A comparative view of the situation a century earlier is given by an opinion in which the high officers of justice in England concurred, including the Solicitor General, afterwards Lord Mansfield. They announced the fundamental rule that powers at war have the right to make prize of the ships and goods of each other upon the high seas; that enemy goods on board a friend's ship may be taken, and that the lawful goods of a friend, on board an enemy's ship, ought to be restored, unless contraband. This opinion or report was approved in 1794 by Sir Wm. Scott, afterwards Lord Stowell, in a letter to Mr. Jay, which in itself and as the basis of Justice Story's treatise on prize law forms a classic in the learning on the subject.¹

In the century between Lord Mansfield's opinion and the Declaration of Paris, and especially through the retaliations of English

¹ Notes on the Principles and Practice of Prize Courts, "by the late Judge Story," London, 1854; 1 Wheat., p. 494, n. 2; 2 Wheat., Appendix, note 1.

order and French decree in the Napoleonic wars, there was keen debate in diplomacy and law respecting "free goods" in enemy or neutral bottoms, and regarding the essentials of valid blockade. The liberal and progressive view has now been established as against the rigor of belligerent rights; "paper blockades" have definitely lost efficacy, and the neutral flag covers enemy goods.

Looking back from the point reached in 1756—the course of development has proceeded by slow degrees from days of unrelieved pillage by land and sea. Rights of persons and property were little regarded in fact even after the religion and morals of Christianity had for centuries theoretically affected government and law. It requires slight reading in chroniclers comparatively recent, like Froissart, to perceive how defenceless the people were from the aggressions of every contending force, regular and irregular, friend and foe, in the innumerable wars and petty conflicts which kept Europe in turmoil for centuries. Whatever the forms and theories of jurisprudence and administration were, in practice they were ineffective. Rights which are now regarded as elementary, for instance, the ordinary protections to neutral property and commerce, the privileges of peaceful inhabitants of belligerent territory, were disregarded. While great and petty dynasties were clashing, in the final analysis it was prince and noble, the ruling classes, against the people. When the democratic resistance slowly emerged from these intolerable conditions and began to take on form and organization, as in the Flemish campaigns of the 14th century, principles and remedies gradually became efficacious.

The "free companies" were typical of the evil situation. Loosely attached as mercenaries, they were dangerous to the states employing them and consumed the resources of any territory where they happened to be, living by booty and indiscriminate plunder. Self-protection, convenience and policy, by a tacit convention among all rulers, drove them out of existence, and the doctrine and practice of taking booty, that is, private property on land seized and treated as prize, were gradually abolished. Thus, a standing abuse, against which the interests of private property and enlightened ideas had for ages protested, disappeared from international law. Yet something very like booty or ransom was taken by the English in the composition for ships in the harbor, demanded and received at the capture of Genoa and her dependencies in the Napoleonic wars; ¹ and it may still be said that in the abstract sense governments have

¹ Ships taken at Genoa, 4 C. Rob. 388.

the right of taking booty, although in practice the right is entirely obsolete.¹ In the Manila prize case, awaiting decision by the Supreme Court, the captors are claiming, as prize, property captured by the naval forces on land. The claim was denied in the lower court.^{2 3}

During the middle ages the historic codes appeared, like the *Consolato del Mare*, drawn from the civil law and recording the faint beginnings of system. The rules regulating capture on the seas thus were traced as part of the primitive scheme of general maritime law and admiralty jurisprudence. Many royal ordinances on specific points contributed from time to time to the subject, and reduced the scattered elements to orderly and comprehensive arrangement, of which the French codification known as the *Marine Ordinance of Louis XIV* furnishes an example. In England the evolution was characteristically legislative and judicial, rather than executive, and acts of Parliament and decisions of the courts established the jurisdiction and the substantive law in admiralty and prize. Throughout the process, from the days of the school-men and learned doctors, the speculative writers on public law, emphasizing the ethical side, disseminated humane ideas and stimulated governmental responsibility and the public conscience.

The entire development is sufficiently indicated by the notes and citations in Justice Story's treatise.

The great admiralty judges of England, from 1750 to 1820, and Lord Stowell in particular, created a remarkable body of law, exploring, applying and establishing the principles of prize for the Anglo-Saxon world, and developing the subject with admirable elasticity and sound judgment. The leaning was to a strict view of belligerent rights, but the exigencies of war were vindicated by convincing logic and with justice and moderation. It is not necessary to say that Lord Stowell was a remarkable man and a very

¹ *Brown v. United States*, 8 Cranch, 110; 1 Kent, Com., 59.

² 29 Wash. Law Rep., 437.

³ The property consisted of naval stores and supplies in the Cavite arsenal. Since this paper was written, the Supreme Court has decided that case and allowed the claim for this property as prize on the ground that it was "naval stores at a naval station, taken by a naval force as the result of a naval engagement."

"In our opinion it would be spinning altogether too nicely to hold that because enemy property on land cannot be taken in prize by land operations, public property designed for hostile uses, and stored on the seashore in an establishment for facilitating naval warfare, might not be made prize, under the statute, when captured by naval forces operating directly from the sea."

great judge. The classic British admiralty reports (Robinson, Edwards, Dodson) display the learning, acumen and industry which called to their aid personal character and judicial temperament of the highest order, along with remarkable power of logical analysis and the gift of luminous statement. Although the principles of prize constitute a special and restricted branch of jurisprudence, touching both international law and admiralty, the student will be amply repaid in profit and scholarly satisfaction for the time given to the opinions which Lord Stowell delivered—for the most part when he was Sir Wm. Scott. The law of marine contracts in all its branches, as to charter engagements, insurance, liens, etc., and the general international rules of trade by sea, have all been wisely expounded and clearly illuminated by him in connection with his judgments on prize.

The cases in our Supreme Court growing out of the war of 1812 and the movement for independence in South America, show on the one hand the influence of the rigorous British decisions, and on the other the national instinct for freedom and justice toward *bona fide* neutral trade. Our own interest in the maintenance of the necessary rigors of belligerency united with the natural impulse to recognize belligerent rights in peoples who were in formidable and justifiable revolt; at the same time, where lawful neutral trade was concerned, both when we were and when we were not belligerents ourselves, the scales were held even.

In the Civil War the United States adopted *pro hac vice* the principles of the Declaration of Paris, excepting the article relating to privateering. But as matter of fact letters of marque were not issued. In the Spanish War our explicit assent by executive proclamation covered the entire Declaration. It is recited to be "desirable that the war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice;" and it was announced "that the policy of the Government will be not to resort to privateering, but to adhere to the rules of the Declaration of Paris." Then follow the declarations respecting neutral flag, neutral goods, and blockade, with special exemptions in favor of enemy merchantmen in ports of the United States at the beginning of the war and clearing within thirty days, or on the high seas at said date bound for the United States. It was provided that the right of search should be exercised with strict regard for neutral rights, and that mail steamers should not be interfered with except on the clearest grounds of suspicion of illegality respect-

ing contraband or blockade.¹ These concessions to Spanish merchant vessels followed the liberal English practice under Orders in Council relating to the Crimean War. The blockade proclamations² allowed neutral vessels lying in any of the blockaded ports thirty days to issue therefrom.

The striking cases of the Civil War³ illustrate the just effects upon national jurisprudence as well as policy of the inevitable exigencies of war. The gist of those decisions was that while it is lawful for neutrals to trade to neutral territory, or even to enemy territory if without violation of blockade or the rules as to contraband, yet a pretended destination to a neutral port, coupled with the intent to break blockade or carry articles ultimately destined for the enemy and obviously for warlike or contraband use, even if innocent and commercial in themselves, cannot serve as protection. The effect of these decisions was to restrict neutral trade and to enlarge the import of contraband where *bona fides* was justly challenged. The protest from England marked her shift from the belligerent of the Napoleonic wars to the carrying neutral of the later day; and the United States presented, perhaps, a similar change of front. But when all the facts are marshalled and the judicial logic studied, neither the executive attitude nor the court's decisions can be successfully questioned. So long as war exists, the justice and reasoning of those opinions will stand in international law as well as in our own municipal law.

It seems that the attitude of England has again changed. In the South African war the British prize court condemned goods not contraband, including food stuffs, consigned by neutrals, citizens of the United States, to a neutral port in Portuguese territory, where the ultimate destination to the enemy country was matter of inference rather than proof. There was no indication that any of these goods were intended for enemy forces. Nevertheless such property, constituting a portion of the cargoes, was condemned on the ground of illicit trading and because, while certain neutral owners who had been previously domiciled in the Transvaal were not themselves enemies, nevertheless the destination of their goods to the enemy's country impressed them with a hostile character. The vessel was British, and was seized on the ground of illegal trade

¹ 30 Stat., 1770.

² 30 Stat., 1769, 1776.

³ The Bermuda, 3 Wall., 514; The Springbok, 5 Wall., 1; The Peterhoff, id., 28.

with the enemy without a license, under the rule both of the municipal law of England and of international law. Ultimately the vessel was restored, notwithstanding the strict rule, because of certain equitable elements founded on the conduct and *bona fides* of her owners or charterers.¹

The general effect of the South African cases is to emphasize again the historic British position in favor of the rights of belligerents.

This review brings us to the decisions of the Supreme Court in cases arising out of the Spanish-American War.

In the *Olinde Rodrigues*² a strong case was presented of an attempted breach of blockade at San Juan. The lower court held the charge made out, but restored the vessel on the ground that a blockade maintained by a single cruiser was not effective as matter of law. The Supreme Court exactly reversed this view. The opinion was that the question of effectiveness is not controlled by the number of blockading forces, but that one modern cruiser is enough as matter of law if sufficient in fact to make ingress and egress dangerous. On the other question the court found that, although the case disclosed did not commend the vessel, and there was flagrant disregard of her duty to shun the port, and reasons for "strong and vehement suspicion," nevertheless on careful review of the entire evidence, they were not compelled to proceed to the extremity of condemning a merchant vessel belonging to citizens of a friendly nation.

In another similar case³ there was a decree of restitution where the neutral was taken while loitering and hovering along the coast near Havana under an accumulation of suspicious facts. The opinion says:

But it may be said that the ship has too many suspicious circumstances to account for, and that we overlook the probative strength arising from their number and their concurrence; that if each one standing alone can be explained, all together unerringly point to the guilt of the ship. We appreciate the force of the argument, but cannot carry it so far.

¹ *The Mashona*; Queen v. Bucknall Bros. *et al.*. So far as discoverable it is not yet reported in the books. Copies of the decision in pamphlet form were received by the State Department in consular despatches.

² 174 U. S., 510.

³ *The Newfoundland*, 176 U. S., 97.

It was held that there should be some tangible proof of the intention to violate the blockade—"a more definite demonstration than this record exhibits." Here again the court leaned to neutral rights. It is probable that the facts in both cases would have evoked the contrary leaning in the prize courts of England and America a century ago, and resulted in condemnation.

In another case respecting neutral rights and blockade,¹ where the facts tended to show more than one secret and illicit enterprise under assertions of innocence and convenient pretexts and evasions, the weight of evidence and authority carried the case to the other side and condemnation followed. The particular enterprise was held to be unlawful as against a blockade *de facto* established by the Admiral, of which the charterer and master were cognizant.

In another line of cases the scope and meaning of the Executive proclamation (*ante*) were considered. In one² the view taken was that an enemy vessel prosecuting a commercial voyage, without intention to violate blockade or any other law of war, from one of our ports to a neutral port abroad, under a coastwise clearance and license to call at another domestic port to take on coal, falls within the class of property which this Government has always desired to treat with great liberality. The court say:

It is, as we think, historically accurate to say that this Government has always been in its views among the most advanced of the governments of the world in favor of mitigating as to all non-combatants the hardships and horrors of war.

The fourth article of the proclamation did not clearly include a vessel which had sailed from the United States before the commencement of the war, and therefore the lower court held that since the Buena Ventura was not in a port of the United States at the date of commencement of the war, she did not come within the terms of the proclamation. The Supreme Court, however, interpreting the proclamation in the light of the liberal policy of the Government and of the principle that where there are two or more interpretations which possibly might be put upon the language, the one most favorable to the belligerent party ought to be adopted, reversed the condemnation and restored. This was a distinct advance toward greater liberality from strict construction and the rigorous rules. The court say:

¹ The Adula, 176 U. S., 361.

² The Buena Ventura, 175 U. S., 384.

We are aware of no adjudications of our own court as to the meaning to be given to words similar to those contained in the proclamation, and it may be that a step in advance is now taken upon this subject. Where, however, the words are reasonably capable of an interpretation which shall include a vessel of this description in the exemption from capture, we are not averse to adopting it even though this court may be the first to do so. If the Executive should hereafter be inclined to take the other view, the language of his proclamation could be so altered as to leave no doubt of that intention, and it would be the duty of this court to be guided and controlled by it.

In two cases presenting substantially identical facts ¹ the fourth and fifth articles of the proclamation were considered. It was held that enemy vessels sailing from a foreign port for an enemy port before the date of the war, with an ultimate destination to a port of the United States for a return cargo, and captured after the date of war while proceeding to an enemy port, are not protected under either the fourth or fifth articles of the proclamation, nor do they come within the reasons usually assigned for exemption from capture. The reasoning of the decision is shown in the following quotations:

If that document (the proclamation) in its bearing on this case could be regarded as ambiguous, a liberal construction might be indulged in. * * * As applicable here, the meaning of the language used appears to us plain and the proclamation not open to interpretation since none is needed. Nor are we justified in expanding executive action by construction because of the diplomatic attitude of this Government in respect to the exemption of all property not contraband of citizens and subjects of nations at war with each other, an exemption which has not as yet been adopted into the law of nations. * * * (The vessel) had no cargo to be discharged at any port or place in the United States, but had cargo for Santiago and Cienfuegos, Cuban ports held by the Spanish forces, and she cleared not for Pensacola, but for Santiago. * * * She was sailing from one port to another port of the enemy, and all the cargo she had on board was destined for the enemy's ports. * * * In these circumstances the fact that the Pedro was under contract to ultimately proceed, after concluding her visit to the Spanish ports, to a port of the United States, to there load for Europe, did not bring her within the exemption of the proclamation.

¹ The Pedro, 175 U. S., 354; The Guido, id. 382.

In the case of *The Panama*¹ it was held that a Spanish mail steamship attached to the naval reserve of Spain under a postal contract, under which she was moderately armed for defence in that service, as well as for possible use by the Spanish government in time of war, was not exempt from capture under the fourth article of the proclamation, or the sixth which enjoined non-interference with the voyages of mail steamers except for grave causes. This clause is held to apply to neutral vessels only, and not to restrict in any degree the authority of the United States or of their naval officers to search and seize vessels carrying the mails between the United States and the enemy's country. The conclusions of the court are succinctly shown in the following paragraphs:

The mere fact, therefore, that the *Panama* was a mail steamship and that she carried mail of the United States on this voyage, does not afford any ground for exempting her from capture. * * *

Upon full consideration of this case, this court is of opinion that the proclamation, expressly declaring that the exemption shall not apply to any Spanish vessel having on board any article prohibited or contraband of war, or a single military or naval officer, or even a dispatch, of the enemy, cannot reasonably be construed as including in the description of "Spanish merchant vessels" which are to be temporarily exempt from capture, a Spanish vessel owned by a subject of the enemy; having an armament fit for hostile use; intended in the event of war to be used as a war vessel; destined to a port of the enemy; and liable on arriving there, to be taken possession of by the enemy, and employed as an auxiliary cruiser of the enemy's navy, in the war with this country.

In the *Fishing Smack Cases*² the necessary harshness of war and the mitigations founded on ethical and humane considerations came into sharp contrast. The argument on behalf of the Government undertook to show that, while by express allowance of the sovereign or executive in the past, small fishing boats of the enemy near their own coasts were exempted on humane grounds and sometimes because they supplied subsistence to the belligerent's own vessels on blockade duty, larger vessels of the types involved ought not to be exempted, and were not in fact exempted under any well established rule of international law, unless by express executive ordinance. But the majority of the Supreme Court found, after an exhaustive re-

¹ 176 U. S., 535.

² 175 U. S., 677.

view of the authorities, especially in international law and under the recent practice of nations, that the exemption of such vessels had become an established rule of prize law, and, in effect, that an affirmative executive order would be necessary to justify capture. The dissenting opinion expressed the view that the vessels were not exempt as matter of law, and stated that—

The rule is that exemption from the rigors of war is in the control of the Executive. He is bound by no immutable rule on the subject. It is for him to apply, or modify, or to deny altogether such immunity as may have been usually extended.

There was involved in the *Benito Estenger*¹ a colorable transfer of a vessel from an enemy to a neutral, the enemy subject claiming that he was an adherent of the Cuban insurgent cause and that the trade in which he was engaged was not illicit. The court held the transfer to be a mere cover to an enemy interest, reaffirmed the established doctrine that enemy status depends upon the citizen or subject relation without regard to individual sentiments or dispositions, and held further that, irrespective of an established blockade and breach thereof, property engaged in any illegal intercourse with the enemy is deemed enemy property.

In the case of the *Carlos F. Roses*² the vessel was condemned as enemy property in the court below, and no appeal was taken. Neutral bankers claimed the cargo on the ground that they had made advances upon the security of the bills of lading indorsed in blank, and were wholly unindemnified except through insurers who would be subrogated to their own rights. Their claim was allowed in the court below; but the majority of the Supreme Court found that the face of the papers and the transactions so far as they were shown presented evidence of an enemy interest which called upon the asserted neutral owners to prove beyond question their right and title, which they had not sufficiently done within the rules and requirements established by the authorities; "that as the vessel was an enemy vessel, the presumption was that the cargo was enemy's property, and this could only be overcome by clear and positive evidence to the contrary."

The court adverted to the fact that provisions by the modern law of nations may become contraband although belonging to a neutral, on account of the particular situation of the war or on ac-

¹ 176 U. S., 568.

² 177 U. S., 655.

count of their destination, as for military use at ports of naval or military equipment (see also the *Benito Estenger*, *supra*), and that in this instance the concentration and accumulation of provisions at Havana might be considered a necessary part of Spanish military operations *imminente bello*, and these particular provisions as especially appropriate for Spanish military use.

The cases not yet decided and now before the court include those arising out of the battles of Manila and Santiago in which the chief question is the special statutory point whether enemy national vessels defeated in the engagements and stranded or partially submerged, but afterwards raised and reconstructed, or intended to be reconstructed, for our navy, are to be taken as prize or as vessels "sunk or otherwise destroyed,"¹ which call for bounty in lieu of prize money.² Another pending case comes up on the distribution of the proceeds of the *Panama*, *ante*, and presents the question of relative force of the captors and the prize on which depends the right of the Government to a moiety or of the captors to the entire proceeds.³ A second question relates to signal distance and the rights of "joint captors," i. e., other vessels claiming to share.⁴ ⁵ The Fishing Smack Cases have also reappeared on the Government's appeal from decree below in the further proceedings directed by the Supreme Court on its judgment of restitution, allowing damages, when the case on condemnation was decided (*ante*). The present phase will determine whether the *quantum* of damages decreed is excessive and whether the Government or the naval captors individually (according to the old rule) are responsible for the damages.

It will be perceived from this summary that the maritime captures of the Spanish war have furnished a variety of legal inquiries, ranging widely through the entire field of prize law, general and statutory. It is also interesting and noticeable that dissenting views have been expressed almost invariably, and about equally whether

¹ sec. 4635, Rev. Stat.

² In these cases it has just been decided that those Spanish war vessels defeated at Manila which were afterwards raised, reconstructed and are actually now in our navy, are good prize. On the other hand, as to the *Teresa*, defeated and stranded at Santiago and lost on the way north after being raised, it was held that until salvage was accomplished, she was not appropriated to the use of the United States, and therefore bounty and not prize was due.

³ sec. 4630, Rev. Stat.

⁴ sec. 4632, Rev. Stat.

⁵ This case has just been decided by the Supreme Court in favor of the appellee's claim to be the sole captor and of inferior force to the prize.

the judgment of the court was for condemnation or restitution. This fact illustrates typically the conflict of judicial opinion on important public questions not fully settled. It also particularly shows the transition and evolution in this branch of international jurisprudence wherein liberal ethics, always in advance of the law of a given time, constantly endeavor to secure firm concessions from the rules of warfare, which are essentially strict. On a complete review it may be said that the opinions both of the majority and minority of the court stand for the most enlightened and humane views, and maintain the advanced position which the United States holds. Where checks have been interposed to claims and doctrines tending to nullify the law as it has come down to us, the court has justly recognized the law as it is and refused to give effect by construction to principles which have not yet been adopted into the law of nations. So long as war exists, the rule thus indicated must necessarily guide executive policy and judicial conclusions. The process of progress will be slow, however steady; and will be substantially contemporaneous and mutual for all the great powers.

It may be said, in conclusion, as illustrating by a final example the advanced attitude at all times of the United States, that by the act of March 3, 1899,¹ prize is now only a national right, the prize grant to naval captors in their individual right having been abolished.

Henry M. Hoyt.

Washington, February, 1903.

¹ 30 Stat., 1004.